83-48

No.

In the

Supreme Court of the United States

October Term, 1982

BRIAN K. DUNLAP and REVEL L. FREEMAN,

Appellants,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal from the
Appellate Court of Illinois,
Fifth Judicial District

JURISDICTIONAL STATEMENT

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June 10, 1983

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Questions Presented

This case presents two constitutional issues:

1. Is the classification of psilocyn as a Schedule I substance in the Illinois Controlled Substances Act so arbitrary and

unreasonable that it violates Dunlap's and Freeman's rights to equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

2. Does the prosecution of Dunlap and Freeman for possession of mushrooms naturally containing psilocyn violate their rights to due process, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, where the Illinois Controlled Substances Act makes no reference to mushrooms?

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Cases

Opinion Below

The opinion of the Illinois Appellate Court, which appears beginning at Appendix 1, is reported at 110 Ill. App. 3d 738, 66 Ill. Dec. 466, 442 N.E.2d 1379 (1982).

The order of the Supreme Court of Illinois denying appellants leave to appeal is not reported. It appears at Appendix 41.

Jurisdictional Grounds

Procedural History

Appellants Brian K. Dunlap and Revel L. Freeman appeal from the final judgment of the Illinois Appellate Court, entered November 22, 1982, holding (1) that the classification of psilocyn as a Schedule I substance in the Illinois Controlled Substances Act is not so arbitrary as to violate appellants' rights to equal protection of the laws, as guaranteed by the Fourteenth Amendment of the Constitution of the United States; and (2) that the Illinois Controlled Substances Act's prohibition of the possession of mushrooms containing psilocyn does not violate appellants' rights to due process, as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Appellants' petition for rehearing in the Appellate Court of Illinois, filed on December 6, 1982, was denied on December

17, 1982.

Appellants filed a timely petition for leave to appeal to the Illinois Supreme Court on January 20, 1983. This petition was denied on April 12, 1983.

Appellants filed their notice of appeal, a copy of which appears beginning at Appendix 42, in the Illinois Appellate Court on June 10, 1983, within 90 days after the Illinois Supreme Court denied leave to appeal.

Statute Conferring Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, § 1257(2). The Illinois Appellate Court rejected appellants' arguments that the classification of psilocyn as a Schedule I substance violated their rights to equal protection and that the Illinois Controlled Substances Act's prohibition against the possession of

mushrooms naturally containing psilocyn denied them due process, thereby upholding the validity of the Illinois Controlled Substances Act over appellants' constitutional challenges.

The judgment of the Illinois Appellate Court, reversing the dismissal ordered by the trial court and remanding the case for trial, was a final judgment as to the constitutional issues within the meaning of 28 U.S.C. § 1257. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

Appellants raised their constitutional objections to the relevant provisions of the Controlled Substances Act at their earliest opportunity, and the trial court sustained these objections and dismissed the informations against appellants. The State appealed to the Illinois Appellate Court, which reversed the trial court's dismissal and remanded the case for trial. Appellants sought and were

denied both a rehearing in the Appellate Court and leave to appeal to the Illinois Supreme Court.

If this Court rejects their appeal, appellants will be precluded from raising the constitutional issues in their trial or in any subsequent appeal by the law of the case doctrine. Therefore, this appeal is from a "final judgment or decree rendered by the highest court of a State in which a decision could be had."

Constitutional Provisions and Statutes Involved

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat. ch. 56 1/2, ¶ 1401(a)(7)(i) (1979):

§ 401. Except as authorized by this Act, it is unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance. Any person who violates this Section with respect to:

(a) the following controlled substances and amounts, notwithstanding any of the provisions of subsections (b), (c), (d) or (e) to the contrary, is guilty of a Class X felony. The fine for violation of this subsection (a) shall not be more than $200,000:

* * *

(7) 300 grams or more of any substance containing any of the following substances, their salts, isomers and salts of isomers:

(i) diethyltryptamine (DET); dimethyltryptamine (DMT); psilocybin (psilocibin, O-phosphoryl-4-hydroxy-N, N-dimethyltryptamine); or psilocyn (psilocin, 4-hydroxy-N, N-dimethyltryptamine);

* * *

Ill. Rev. Stat. ch. 56 1/2, ¶ 1405 (1979):

§ 405. (a) Any person who engages in a calculated criminal drug conspiracy, as defined in subsection (b), is guilty of a Class X felony. The fine for violation of this section shall not be more than $200,000, and the offender shall be subject to the forfeitures prescribed in subsection (c).

(b) For purposes of this section, a person engages in a calculated criminal

drug conspiracy when:

(1) he violates any of the provisions of subsections (a) or (b) of Section 401 or subsection (a) or Section 402; and

(2) such violation is a part of a conspiracy undertaken or carried on with two or more other persons; and

(3) he obtains anything of value greater than $500 from, or organizes, directs or finances such violation or conspiracy.

(c) Any person who is convicted under this section of engaging in a calculated criminal drug conspiracy shall forfeit to the State of Illinois:

(1) the receipts obtained by him in such conspiracy; and

(2) any of his interest in, claims against, receipts from, or property or rights of any kind affording a source of influence over, such conspiracy.

* * *

Ill. Rev. Stat. ch. 56 1/2, ¶ 1204 (1979):

(a) The controlled substances listed in this section are included in Schedule I.

* * *

(d) Unless specifically excepted or unless listed in another schedule, any material compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, or which contains any of its salts, isomers and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation (for the purposes of this paragraph only, the term "isomer" includes the optical, position and geomet-

ric isomers):

* * *

(14) Psilocybin;
(15) Psilocyn;

* * *

Statement of the Case

Appellants Brian Dunlap and Revel Freeman were charged by information in the Circuit Court of Williamson County, Illinois, with participation in an unlawful criminal drug conspiracy, with unlawful manufacture of a controlled substance, and with unlawful possession with intent to manufacture a controlled substance, psilocyn, a Schedule I drug. This substance was found in mushrooms alleged to have been obtained from Revel Freeman's residence.

Appellants moved to dismiss the informations on two constitutional grounds: (1) the statutes under which appellants are charged deny them of the equal protec-

tion of the laws, guaranteed by both the Illinois and United States Constitutions, because the classification of psilocyn as a Schedule I drug is without rational basis; and (2) the statutes deny appellants due process by failing to advise a person of ordinary intelligence that the possession of mushrooms naturally containing psilocyn is prohibited.

In their pre-trial hearing, appellants offered the testimony of Dr. Ronald K. Siegel, a psychologist and psychopharmacologist, who testified at length concerning the scientific and social data relating to psilocyn. His testimony supported appellants' contention that the classification of psilocyn as a Schedule I drug lacked a rational basis. The State produced no expert testimony.

On October 28, 1981, Williamson County Circuit Judge William Lewis ordered that the informations against appellants

be dismissed on alternate grounds: (1) the Illinois Controlled Substances Act did not prohibit the possession of mushrooms naturally containing psilocyn; and (2) if the Act did prohibit possession of mushrooms, it violated the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The State appealed the trial court's dismissal of the informations to the Illinois Appellate Court. On this appeal, appellants again argued that the relevant sections of the Illinois Controlled Substances Act violated their Fourteenth Amendment rights to due process and equal protection, as well as issues of statutory construction not relevant to this appeal.

The Illinois Appellate Court rejected appellants' statutory construction and constitutional arguments and reversed the trial court's dismissal of the informations. The case was remanded to the trial

court for trial.

Appellants petitioned the Appellate Court for a rehearing, but the petition was denied. Subsequently, appellants sought timely leave to appeal to the Illinois Supreme Court, again raising the constitutional issues of due process and equal protection. This petition was also denied.

The Questions Are Substantial

I. The Misclassification of Psilocyn Deprived Appellants of Equal Protection

The Illinois Controlled Substances Act (like the Uniform Controlled Substances Act and the Federal Controlled Substances Act on which it is based) lists five "schedules" of controlled substances, theoretically in decreasing order of harmfulness. Ill. Rev. Stat. ch. 56 1/2, ¶¶ 1201-1215 (1979). Thus, the most serious drugs are listed in Schedule I, including

such substances as heroin, STP, and LSD. ¶ 1204. Cocaine and opium are examples of Schedule II drugs. ¶ 1206.

The penalties associated with Schedule I drugs are most severe. Certain transactions in Schedule I drugs, including psilocyn, are what are known under Illinois law as "Class X" felonies -- the most serious crimes short of murder. ¶¶ 1401, 1405. The permissible sentences for conviction of a Class X felony range from a minimum of six years imprisonment (without possibility of a suspended sentence or probation) to as much as 30 years in prison. Ill. Rev. Stat. ch. 38, ¶ 1005-8-1 (1979). Other Class X felonies include aggravated kidnapping for ransom (ch. 38, ¶ 10-2), rape (¶ 11-1), deviate sexual assault (¶ 11-3), aggravated indecent liberties with a child (¶ 11-4.1), and heinous battery (¶ 12-4.1). Lesser felonies include aggravated battery of a child

(¶ 12-4.3), voluntary manslaughter (¶ 9-2), aggravated kidnapping (¶ 10-2), and indecent liberties with a child (¶ 11-4).

In the instant case, a pre-trial hearing was held on defendants' constitutional objections to the statutes in question. At that hearing, only one expert witness testified -- Dr. Ronald Siegel, clearly one of the foremost authorities in the United States on psilocyn and related compounds, who testified for defendants. The State presented no contrary evidence whatsoever.

Dr. Siegel testified that the abuse potential of psilocyn is extremely low and that psilocyn is not a dangerous drug and produces very little physiological effect. He testified that the person who ingests Psilocybe mushrooms develops no tolerance for psilocyn and experiences no withdrawal symptoms. According to Dr. Siegel, the only person to testify on the classifica-

tion issue, there is absolutely no danger of physical addiction and only a minimal risk ("probably so rare as not to exist") of psychological dependence. And because psilocyn is metabolized and excreted quickly and "cleanly" from the body, there are no long-term health problems associated with its use. The State presented no evidence to rebut defendants' expert testimony regarding the misclassification issue.

The trial court dismissed the informations against appellants, and the State appealed. The Illinois Appellate Court rejected appellants' misclassification argument and reversed the trial court's dismissal, basing its decision largely upon information in scientific articles not part of the record in this case. Only by going outside of the record was the Illinois Appellate Court able to find evidence it deemed sufficient to support the legis-

lature's classification of psilocyn as a Schedule I substance. Defendants have had no opportunity to challenge the correctness and authority of these articles. Thus, if the Appellate Court's opinion stands, defendants will be prosecuted under a law that they have not been given a fair opportunity to contest.

This decision of the Illinois Appellate Court opens the door to legislation which is arbitrary and allows the legislature to give vent to prejudices without a rational basis. From the evidence presented in this case, it is clear that psilocyn presents no hazard to the public health and has little, if any, potential for abuse. Yet the mere possession with the intent to deliver of "300 grams or more of <u>any substance containing</u>" psilocyn is a Class X felony, and subjects the possessor to a possible fine of up to $200,000 (Ill. Rev. Stat. ch. 56 1/2, ¶

1401(a)(7)(i) (1979)) and requires imprisonment for "not less than 6 years and not more than 30 years . . . ." Ill. Rev. Stat. ch. 38, ¶ 1005-8-1. If the legislature can subject possessors of substances with as little physiological or psychological effect as psilocyn to between 6 and 30 years' imprisonment and up to a $200,000 fine, what conduct will be free from punishment? If this classification is rational, then the legislature would be equally justified in subjecting the possessor of beer to 30 years imprisonment. Or it could properly classify coffee in the same schedule as heroin.

This Court has consistently refused to grant petitions for certiorari in cases challenging the classification of cocaine as a narcotic. See, e.g., United States v. Alexander, 673 F.2d 287 (9th Cir.), cert. denied, 103 S. Ct. 168 (1982); United States v. Vila, 599 F.2d 21 (2d

Cir. 1979), cert. denied, 444 U.S. 837 (1979). However, the misclassification issue in this case is more substantial than that involved in the cocaine cases. Here there was absolutely no evidence presented which would support the classification of psilocyn as a Schedule I substance. Unlike cocaine, psilocyn is not subject to widespread abuse. In fact, the only evidence presented indicated that psilocyn was not a dangerous drug and that there are no Psilocybe mushroom problems in the United States. In the absence of any proof of its dangerousness or potential for abuse, psilocyn's classification as a Schedule I drug, with the attendant penalties associated with its possession, is irrational and arbitrary. Therefore, this gross misclassification deprived appellants of the equal protection of the laws and is unconstitutional. People v. McCabe, 49 Ill. 2d 338, 275 N.E.2d 407

(1971). Cf. Solem v. Helm, 51 U.S.L.W. 5019 (U.S. June 28, 1983) (No. 82-492) (8th Amendment violation).

II. The Omission of Psilocybe Mushrooms From the List of Prohibited Substances Deprived Appellants of Due Process.

The Illinois Controlled Substances Act (and the Federal and Uniform Controlled Substances Acts) lists psilocyn and psilocybin as proscribed Schedule I substances. The Acts do not list the natural sources of these substances as controlled substances. Appellants argued, and the trial court agreed, that the omission of Psilocybe mushrooms from the list of proscribed substances deprived appellants of due process, if indeed the possession of mushrooms was proscribed. The Illinois Appellate Court rejected appellants' due process argument and remanded the case for trial.

Even though most of the other natural

sources of controlled substances are listed in the same schedules as their extracted controlled substances (e.g., coca leaves, the opium poppy and straw (¶ 1206(b)), peyote cacti (¶ 1204(d)(11)), the Psilocybe mushroom is not listed. Thus, the Illinois Appellate Court's decision grants prosecutors and courts power to legislate what natural sources of controlled substances are proscribed, without regard to whether the sources are listed in the schedule. This grant of power is too broad and would allow prosecutors and courts to rewrite criminal statutes in accordance with their own beliefs and prejudices. Such a rule flies in the face of maxims of criminal statutory construction requiring lenity in favor of the defendant and strict construction against the state.

The Illinois Appellate Court found that the legislature had been as specific

as it could be in proscribing the possession of "any substance containing" psilocyn, and that therefore there was no due process violation. Yet the legislature was able to list the natural sources of other proscribed substances. Surely requiring the addition of Psilocybe mushrooms to the list of proscribed substances would not impose an impossible, or even unreasonable, burden upon the legislature and would have given appellants fair notice that their conduct was prohibited.

Under the Illinois Appellate Court's decision, a defendant could be charged with possession of a controlled substance if he had in his possession morning glory seeds, knowing that they contained trace amounts of lysergic acid. The same would be true of other natural products that happen to contain tiny amounts of prohibited substances. A person of average intelligence might be expected to know

that those natural sources contained controlled substances, but that person would not be on notice that possession of the natural sources themselves was proscribed, especially when other natural sources are expressly included in the list of controlled substances.

Because the Controlled Substances Act did not give appellants fair notice that their conduct was proscribed, and reasonable persons would necessarily guess at its meaning and differ as to its application, it deprived them of their rights to due process and was therefore properly declared unconstitutional by the trial court. Jordan v. DeGeorge, 341 U.S. 223, 230 (1951); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

Conclusion

For the foregoing reasons, Appellants Brian K. Dunlap and Revel L. Freeman respectfully pray that the judgment of the

Illinois Appellate Court be reversed and the judgment of the Illinois Circuit Court dismissing the informations be affirmed.

Respectfully submitted,

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APPENDIX

OPINION OF THE ILLINOIS APPELLATE COURT

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110 Ill. App. 3d 738
66 Ill. Dec. 466
442 N.E.2d 1379

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

vs.

BRIAN K. DUNLAP and REVEL L. FREEMAN,
Defendants-Appellees.

No. 81-378

Appellate Court of Illinois,
Fifth District.

Nov. 22, 1982.

Rehearing Denied Dec. 17, 1982

JUSTICE WELCH delivered the opinion of the court:

Defendants Brian Dunlap and Revel Freeman were charged by information in the circuit court of Williamson County with having committed an unlawful calculated criminal drug conspiracy, with unlawful manufacture of a controlled substance and

with unlawful possession with intent to manufacture a controlled substance, in violation of section 405 and 401(a)(7) of the Illinois Controlled Substances Act (Ill. Rev. Stat. 1979, ch. 56 1/2, pars. 1405, 1401(a)(7)). The substance alleged to have been the subject of these offenses is psilocyn, a Schedule I hallucinogen. (Ill. Rev. Stat. 1979, ch. 56 1/2, par. 1204(d)(15).) According to the testimony offered by the State at defendants' preliminary hearing, this substance was supposed to have been found in Psilocybe mushrooms alleged to have been seized from defendant Freeman's Carterville, Illinois, residence.

The defendants moved to dismiss these informations on various constitutional and statutory grounds. Following an evidentiary hearing and arguments of counsel, the court granted the motions. It held that the Illinois Controlled Substances Act

(Ill. Rev. Stat. 1979, ch. 56 1/2, par. 1100 et seq.) violated defendants' due process rights as applied to the possession of Psilocybe mushrooms, because the statute did not specify which types of mushrooms were prohibited under that Act. The court also stated that the statute did not specifically proscribe possession of the mushrooms themselves, as opposed to the extracted psilocyn, and that the cultivation of Psilocybe mushrooms was not illegal under the definition of "manufacture" contained in Section 102(z) of the Act (Ill. Rev. Stat. 1979, ch. 56 1/2, par. 1102(z)). From this order of dismissal, the People have appealed to this court pursuant to Supreme Court Rule 604(a)(1). (87 Ill. 2d R. 604(a)(1)).

This appeal presents four separate issues:

(1) Does the listing of psilocyn in section 204(d)(15) of the Illinois

Controlled Substances Act (Ill. Rev. Stat. 1979, ch. 56 1/2, par. 1204(d)(15)) suffice to prohibit the possession of mushrooms which, in their natural state, contain psilocyn?

(2) If the Illinois Controlled Substances Act prohibits the possession of mushrooms which, in their natural state, contain psilocyn, then does the Act violate due process in failing to specify that mushrooms containing psilocyn are proscribed?

(3) Does the cultivation of a plant containing a controlled substance constitute the "manufacture" of that substance?

(4) Is the classification of psilocyn as a Schedule I substance arbitrary and thus violative of the principle of equal protection of the laws?

We consider these questions in the order presented above.

At trial, the defendants argued, and the trial court agreed, that the Illinois Controlled Substances Act does not prohibit the possession of mushrooms containing psilocyn. In support of this result, defendants invite comparison with other portions of the Illinois Controlled Substances Act, as well as with provisions of the Cannabis Control Act. For example, the opium poppy and poppy straw, natural source [sic] of opium, are listed in Schedule II along with several forms of opium (Ill. Rev. Stat. 1979, ch. 56 1/2, pars. 1206(b)(1)(1) through 1206(b)(1)(6), 1206(b)(3)), and coca leaves, the natural sources of cocaine, are prohibited along with several derivatives of those leaves. (Ill. Rev. Stat. 1979, ch. 56 1/2, par. 1206(b)(4).) Also, the Cannabis Control Act proscribes possession of the Cannabis sativa plant and its seeds and resin. (Ill. Rev. Stat. 1979, ch. 56 1/2, par.

703(a).) Defendants refer to the maxim of statutory construction known as "expressio unius est exclusio alterius," or, the expression of one thing in a statute implies the exclusion of all others. (People v. Caryl (1977), 54 Ill. App. 3d 537, 369 N.E.2d 926.) Applying this maxim to the Illinois Controlled Substances Act, the defendants argue that the reference to these other natural sources of controlled substances, combined with the omission of Psilocybe mushrooms from the Act, implies that possession of these mushrooms is not illegal.

This reasoning has been employed in several Canadian cases. In Regina v. Parnell (1979), 51 Can. Crim. Cas. 2d 413, the defendant was charged under the Canadian Food and Drugs Act (Can. Rev. Stat. 1970, ch. F-27) with possession of a restricted drug listed in that Act, namely psilocybin. She was alleged to have pos-

sessed mushrooms which contained psilocybin. The British Columbia Court of Appeal held that the Food and Drugs Act, by failing to refer to mushrooms as well as psilocybin, could not be construed as prohibiting possession of the mushrooms. Parnell has been followed in other recent Canadian decisions. (Regina v. Cartier (1980), 13 Alta. 2d 164, 54 Can. Crim. Cas. 2d 32; Re Coutu (1981), 61 Can. Crim. Cas. 2d 149.) Defendants urge this court to reach the same result under the Illinois Controlled Substances Act.

However, the Parnell, Cartier and Coutu opinions are dependent upon the wording of the Canadian Food and Drugs Act, which we find quite dissimilar from that of the Illinois Controlled Substances Act. Section 41(1) of the Food and Drugs Act prohibits the possession of a "restricted drug" (Can. Rev. Stat. 1970, ch. F-27, Sec. 41(1)), which is defined in

Section 40 as "any drug or other substance included in Schedule H" (Can. Rev. Stat. 1970, ch. F-27, sec. 40). One of the Schedule H substances is psilocybin or any salt thereof. According to Chief Justice Nemetz, it was the narrow definition of the term "restricted drug" which persuaded him that "the mere possession of the substance psilocybin as an integral part of the natural plant cannot support a conviction for possession of a restricted drug ***." Regina v. Parnell (1979), 51 Can. Crim. Cas. 2d 413, 414.

As a comparison, Chief Justice Nemetz referred to the definition of "narcotic" in section 2 of the Canadian Narcotic control Act as "any substance included in the schedule or anything that contains any substance included in the schedule." (Can. Rev. Stat. 1970, ch. N-1, sec. 2). He noted that the first three paragraphs of the schedule to the Narcotic Control

Act included the opium poppy, coca, and Cannabis sativa, as well as preparations and derivatives from those sources. He concluded that in enacting the Narcotic Control Act, "Parliament intended to prohibit the plant as well as the derivative drug." Regina v. Parnell (1976), 51 Can. Crim. Cas. 2d 413, 415.

That portion of Schedule I in the Illinois Controlled Substances Act which contains psilocyn lists "any material compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances." (Ill. Rev. Stat. 1979, ch. 56 1/2, par. 1204(d).) The defendants argued at trial, although they have not done so on appeal, that the General Assembly did not intend to prohibit the possession of "any material" containing these substances because there is no comma between the words "material" and "compound" in this provision. Yet, no

definition for the phrase "material compound" has been offered by the defendants, nor have we been able to discern what a "material compound" would be. As the People point out, the series of words "material, compound, mixture, or preparation" appears 12 times in the Schedules to the Illinois Controlled Substances Act, and in these occurrences, "material" is separated from "compound" by a comma 10 times (Ill. Rev. Stat. 1979, ch. 56 1/2, pars. 1206(d), 1206(e), 1208(b), 1208(c), 1208(d), 1208(f), 1210(b), 1210(c), 1210(d), and 1210(e)), while the comma is omitted from that location only twice (Ill. Rev. Stat. 1979, ch. 56 1/2, pars. 1204(d), 1204(e)). The current version of the Act has resolved any apparent inconsistency among these provisions (Ill. Rev. Stat. 1981, ch. 56 1/2, pars. 1204(d), 1204(e)) by inserting a comma between "material" and "compound" in all 12

locations. While normally it is presumed that a legislative amendment is designed to effectuate a change in the law, that presumption may be overcome by the circumstances and substance of the amendment. (People v. Youngbey (1980), 82 Ill. 2d 556, 413 N.E.2d 416). Because, in construing the same words or phrases which occur in different parts of a statute, those words or phrases should be given the same meaning (People v. Lutz (1978), 73 Ill. 2d 204, 383 N.E.2d 171), we believe that the General Assembly merely intended to clarify existing law. Consequently, a comma must be read between "material" and "compound" in sections 204(d) and 204(e) of the 1979 version of the Illinois Controlled Substances Act.

More importantly, however, the defendants argue that even the broad language purporting to include within Schedule I "any material * * * which contains any

quantity of * * * psilocyn" cannot proscribe the possession of Psilocybe mushrooms without specifically mentioning this natural source of psilocyn. They direct our attention to the well-established rule that penal statutes are to be strictly construed. (People v. Robinson (1982), 89 Ill. 2d 469, 475, 414 N.E.2d 674.) Nonetheless, it must be cautioned that this rule of construction should not be so rigidly applied as to defeat the plainly expressed intent of the legislature. (People v. Bratcher (1976), 63 Ill. 2d 534, 349 N.E.2d 31; People v. Jones (1981), 100 Ill. App. 3d 831, 426 N.E.2d 1214.) It is our opinion that the meaning of section 204(d) of the Illinois Controlled Substances Act is expressed without ambiguity. The words "any material * * * which contains any quantity of * * * psilocyn" mean exactly that -- any such material is a Schedule I substance, and

thus mushrooms which, in their natural state, contain psilocyn, are included in Schedule I. We find it difficult to see how the General Assembly could have used any more direct language than it employed.

Nor does the omission of mushrooms from the Illinois Controlled Substances Act mandate the construction of that statute urged by the defendants. The rule "expressio unius est esclusio alterius" is of assistance only where the meaning of a statute is ambiguous, because that maxim requires the interpretation of a statute by use of an implication. (People ex rel. Moss v. Pate (1964), 30 Ill. 2d 271, 195 N.E.2d 641; People ex rel. County of DuPage v. Smith (1961), 21 Ill. 2d 572, 173 N.E.2d 485.) Since the Illinois Controlled Substances Act is explicit in prohibiting "any material" containing psilocybin, the failure to mention mushrooms in that Act cannot negate that provision.

We cannot exclude from the Illinois Controlled Substances Act by implication that which certainly falls into the broad category of any material containing a substance listed in Section 204(d). To so hold would be to ignore the plain wording of that section.

Moreover, a statute should be construed so as to avoid an absurd result. (People v. Bournes (1977), 55 Ill. App. 3d 237, 370 N.E.2d 1230; People v. Floom (1977), 52 Ill. App. 3d 971, 368 N.E.2d 410.) At trial, the defendants introduced the testimony of Dr. Ronald Siegel, a psychopharmacologist and psychologist who has had considerable experience in research on psilocyn. Dr. Siegel stated that psilocyn is taken predominantly by eating mushrooms which contain the substance. He noted that it is possible to produce psilocyn synthetically, but such a process "requires fairly sophisticated

chemical apparatus" and demands the use of reagents that are difficult to work with. According to Dr. Siegel, the only company in the world which produced psilocyn, Sandoz Laboratories in Switzerland, stopped manufacturing it in 1966 and turned over much of its supplies to the United States government for distribution to researchers, which is where Siegel was able to obtain psilocyn for his work.

Dr. Siegel also testified that because Psilocybe mushrooms normally contain only .05% psilocyn by dry weight, it would take approximately 227,000 pounds of mushrooms, by dry weight, to produce 300 grams of psilocyn. He explained that the dry weight of the mushrooms would not be equivalent to their weight in an unaltered form, as the weight of a mushroom is primarily that of its water content.

This evidence convinces us that, were we to accept the construction of the stat-

ute urged by the defendants, an absurd result would indeed occur. Psilocyn would be prohibited in a manufactured form, which involves a process beyond the capabilities of the "bathroom or kitchen chemist," as Dr. Siegel commented. It would also be prohibited in a refined form, which requires the extraction of miniscule amounts of psilocyn from massive quantities of mushrooms. Yet, the most common source of the substance, the mushrooms themselves, would be perfectly legal, as would the taking of psilocyn by ingestion of the mushrooms. We cannot believe that the General Assembly intended such a haphazard and ineffectual ban on psilocyn, especially given the reference in the Illinois Controlled Substances Act to any material containing psilocyn. Instead, we hold that, by adopting that statute, as it is worded, the legislature meant to prohibit possession of mushrooms which, in

their natural state, contain psilocyn.

The next question posed by this appeal is, given that the Controlled Substances Act outlaws possession of mushrooms, does that Act violate due process by failing to give adequate notice of the criminality of that conduct? This issue involves two separate arguments. First, the Act violates the due process rights of a person who possesses mushrooms which he knows to contain psilocyn, because it does not give fair warning that that possession is illegal. Second, the Act violates the due process rights of a person who possesses mushrooms containing psilocyn without knowing that they contain psilocyn, because the Act does not specify which mushrooms are illegal.

The trial court agreed with the defendants that the Act did not give any indication that possession of mushrooms was illegal. As such, the court concluded

that the Act violated the due process rights of individuals who possess mushrooms knowing them to contain psilocyn. The Florida Supreme Court decided similarly in a prosecution under a statute (Fla. Stat. sec. 893.01 et seq. (1975)), which, like the Illinois Controlled Substances Act, is based upon the Uniform Controlled Substances Act (9 Uniform Laws Annotated 197 (1970)). In a 4-3 decision in Fiske v. State (Fla. 1978), 366 So. 2d 423, the court reversed the defendant's conviction for the possession of psilocybin, a Schedule I substance also contained in Psilocybe mushrooms. The majority reasoned that if the Florida Drug Abuse Act would specify that psilocybin is contained in certain identifiable mushrooms, listing those mushrooms, then the Act would be constitutional as applied to a defendant charged with possession of mushrooms containing psilocybin. The court continued:

> "The statute as presently framed, however, gives no information as to what plants may contain psilocybin in its natural state. More particularly, the statute does not advise a person of ordinary and common intelligence that this substance is contained in a particular variety of mushroom. The statute, therefore, may not be applied constitutionally to appellant. It does not give fair warning that possession of the mushrooms possessed by appellant is a crime." 366 So. 2d 423, 424.

It is not argued that the proposed application of the Illinois Controlled Substances Act imposes upon first amendment rights, and thus whether the statute would be unconstitutionally applied in this case depends upon whether it meets two criteria. First, the statute must not be so vague that persons of ordinary intelligence must guess at its meaning, and, second, it must provide definite standards for law enforcement officers and triers of fact so that its application does not depend upon personal interpretations. (People v. Garrison (1980), 82 Ill. 2d

444, 412 N.E.2d 483, appeal dismissed (1981), 450 U.S. 961, 67 L. Ed. 2d 610, 101 S. Ct. 1475; Grayned v. City of Rockford (1972), 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294.) To meet these requirements, the language used in the statute must convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. (People v. Clark (1979), 71 Ill. App. 3d 381, 389 N.E.2d 911.) This inquiry requires an examination of that language as well as the legislative purpose behind the enactment and any relevant judicial interpretations of the statute. (People v. Kleffman (1980), 90 Ill. App. 3d 1, 412 N.E.2d 1057; People v. Dednam (1973), 55 Ill. 2d 565, 304 N.E.2d 627.) A statute enjoys a presumption of constitutionality. People v. Schwartz (1976), 64 Ill. 2d 275, 356 N.E.2d 8, cert. denied (1977), 429 U.S. 1098, 51 L. Ed. 2d 545,

97 S. Ct. 1116.

Under these established principles of constitutional law, the decision in Fiske is erroneous. While conceding that the Florida Drug Abuse Act, like the Illinois Controlled Substances Act, "explicitly controls any material which contains psilocybin and makes possession of the material a felony," (366 So. 2d 423, 424; Fla. Stat. sec. 893.03(1)(c)(18) (1970)), the Fiske majority nonetheless held, by implication, that the only natural reading of the phrase "any material" would be limited to a controlled substance "in capsule, pill or similar form." (366 So. 2d 423, 424.) In our view, this is an overly restrictive and artificial interpretation of that language. In fact, the term "material" is more commonly used to refer to an item which is the source for something else rather than a finished product (see Webster's Third New International

Dictionary 1392 (1971)), and thus, as we have suggested earlier, a person of ordinary intelligence would be amply apprised by section 204(d) of the Illinois Controlled Substances Act that possession of Psilocybe mushrooms is illegal. As applied to one possessing mushrooms known to contain psilocyn, the Controlled Substances Act is not unconstitutional.

The trial court indicated that the Act did not specify which mushrooms contained psilocyn, and, by implication, it decided that the Act violated due process as applied to an individual who possessed Psilocybe mushrooms without knowing that they contained psilocyn. Initially, we doubt that these defendants have standing to raise this issue, because, in considering a motion to dismiss the informations, we must assume the truth of the allegations in the informations (cf. People ex rel. Clark v. McCurdie (1966), 75 Ill.

App. 2d 217, 220 N.E.2d 318), which means, in this case, that we must accept that the defendants possessed the mushrooms, knowing them to contain psilocyn. The People contend that, in ruling on defendants' motion, the court erroneously decided a factual issue by stating that the defendants did not know that the mushrooms contained psilocyn. However, a reading of the comments of the court, in their entirety, shows that such a determination was not made.

Even if we concede that the defendants may raise this issue, though, it does not present any doubts of the constitutionality of the Illinois Controlled Substances Act. An individual who cultivated or otherwise possessed Psilocybe mushrooms without knowing them to contain psilocyn would not be prosecuted successfully under that statute, because in a prosecution for the possession or sale of

controlled substances, the State must prove that a defendant had knowledge of the nature of the substance possessed or sold. (People v. Bussie (1968), 41 Ill. 2d 323, 243 N.E.2d 196, cert. denied (1969), 396 U.S. 819, 24 L. Ed. 2d 70, 90 S.Ct. 56; People v. Castro (1973), 10 Ill. App. 3d 1078, 295 N.E.2d 538.) This knowledge requirement meets the objection that the Controlled Substances Act punishes without warning an offense of which the accused was unaware. (Screws v. United States (1945), 325 U.S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031; Colautti v. Franklin (1979), 439 U.S. 379, 58 L. Ed. 2d 596, 99 S.Ct. 675.) We conclude therefore that the Illinois Controlled Substances Act's prohibition of the possession of mushrooms containing psilocyn does not violate the due process rights of either those who possess the mushrooms knowing them to contain psilocyn, or those who possess

them unaware of their characteristics.

Although the trial court expressly premised its dismissal of the informations on the constitutional grounds discussed above, the court also noted in passing that the mere cultivation of the mushrooms did not constitute "manufacture" of a controlled substance as prohibited in section 401 of the Illinois Controlled Substances Act (Ill. Rev. Stat. 1979, ch. 56 1/2, par. 1401). The People have argued, at trial and before this court, that this construction of the Act is erroneous, and we agree. Section 102(z) of the Act (Ill. Rev. Stat. 1979, ch. 56 1/2, par. 1102(z)) defines "manufacture" as

> "the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling of its container ***."

"Production" or "produce" means the "manufacture, planting, cultivating, growing, or harvesting of a controlled substance." (Ill. Rev. Stat. 1979, ch. 56 1/2, par. 1102(oo).) It has been stated that, by itself, the definition of "manufacture" might suggest that that term refers only to extraction, chemical synthesis or a combination thereof, but when read with the definition of production, it is apparent that the growing of plant matter containing a controlled substance is prohibited. (Boring v. State (Miss. 1978), 365 So. 2d 960, 961, cert. denied (1979), 442 U.S. 916, 61 L. Ed. 2d 283, 99 S. Ct. 2835; see also Bedell v. State (1976), 260 Ark. 401, 541 S.W.2d 297, cert. denied (1977), 430 U.S. 931, 51 L. Ed. 2d 775, 97 S.Ct. 1552.) We believe that this construction of the Illinois Controlled Substances Act is imperative according to its terms.

The final issue in this case was not resolved by the trial court, but appropriate evidence was presented by the defendants, and the argument was made both at the trial level and in this court. It is whether the classification of psilocyn as a Schedule I substance is so arbitrary as to violate equal protection. The criteria for the inclusion of a substance in Schedule I are whether "(1) the substance has high potential for abuse; and (2) the substance has no currently accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." (Ill. Rev. Stat. 1979, ch. 56 1/2, par. 1203). The defendants concede that psilocyn has no known medical use in the United States, so, keeping in mind the reference to a "high potential for abuse," we must determine "[i]f any state of facts may reasonably be conceived which would justify the

classification" of psilocyn as a Schedule I controlled substance. People v. McCabe (1971), 49 Ill. 2d 338, 341, 275 N.E.2d 407, 409; People v. McCarty (1981), 86 Ill. 2d 247, 427 N.E.2d 147.

The hallucinogenic properties of certain mushrooms have long been a matter of common knowledge in several native American cultures. In Mexico, these mushrooms, in addition to being ingested in aid of religious ritual, also took on a symbolic character. (P. Furst, Hallucinogens and Culture 75-88 (1976).) Contemporary interest in these varieties of mushrooms may be traced to anthropological studies of surviving "mushroom cults" in Mexico, which studies were begun in the 1950s, as well as to the first extraction of pure psilocybin from the mushrooms themselves in 1958. F. Brown, Hallucinogenic Drugs 81-83 (1972); B. Wells, Psychedelic Drugs 52-53 (1973).

The physiological effects of psilocyn were described at trial by Dr. Siegel, who, as noted above, has done research on psilocyn under laboratory conditions. He testified that the substance generally begins to affect the subject within 15 minutes to one-half hour after ingestion. It has been said that the first half-hour following the ingestion of the companion substance psilocybin is "rather unpleasant and typified by dizziness, nausea and anxiety" and the next half-hour includes "further somatic effects such as sweating and ataxia." (B. Wells, Psychedelic Drugs 53 (1973).) It begins to excite electrical activity in the brain, it can alter breathing patterns somewhat, and it may change the subject's blood pressure. The pupils of the subject frequently become dilated, as may the blood vessels of the skin and neck, producing a flushed appearance. Dr. Siegel has recorded a skin

temperature drop of up to 3° (F) in his subjects. These physiological symptoms usually disappear four hours after ingestion, by which time the presence of psilocyn in the blood and tissues of the body has dropped to an immeasurable quantity. Dr. Siegel remarked that a dosage of 3 to 4 milligrams of psilocyn could be toxic, while it would probably take 20 or 30 milligrams to constitute a lethal dose.

As a result of his investigations, Dr. Siegel concluded that psilocyn is not a dangerous drug. He stated that psilocyn was not physically addictive because one does not build up a tolerance to it, and because there are no withdrawal symptoms which occur when a psilocyn user ceases to take the substance. Dr. Siegel also contended that, because the psilocyn experience is not as intensely euphoric and short-lived as that produced by heroin or cocaine, it is not likely to produce

psychological dependence.

The defendants urge us to adopt the position taken by Dr. Siegel and find that the classification of psilocyn as a Schedule I substance is irrational. They point to the criteria which have been established for the Illinois Dangerous Drug Commission in determining the appropriate classification of a controlled substance and argue that, under these guidelines, psilocyn should not be placed in Schedule I. Those criteria are:

"(1) the actual or relative potential for abuse;

(2) the scientific evidence of its pharmacological effect, if known;

(3) the state of current scientific knowledge regarding the substance;

(4) the history and current pattern of abuse;

(5) the scope, duration, and significance of abuse;

(6) the risk to the public health;

(7) the potential of the substance to produce psychological or physiological dependence;

(8) whether the substance is an immediate precursor of a substance already controlled under this article;

(9) the immediate harmful effect in terms of potentially fatal dosage; and

(10) the long-range effects in terms of permanent health impairment." (Ill. Rev. Stat. 1979, ch. 56 1/2, par. 1201(a).)

The defendants contend that Dr. Siegel's testimony establishes that psilocyn is not harmful according to the factors mentioned in categories (6) through (9), and that its properties in the other categories do not justify its classification in Schedule I.

The Illinois Controlled Substances Act is based on the Uniform Controlled Substances Act. The Uniform Act places

psilocyn, along with other major hallucinogenic agents such as LSD, mescaline, peyote, DMT, DET and STP in its Schedule I. The Commissioners reasoned that, in addition to having no accepted medical use in the United States, these hallucinogens "have a high potential for abuse." Commissioners' note to Section 203, Uniform Controlled Substances Act, 9 Uniform Laws Annotated 197 (1970).

We cannot find this assessment of these substances to be arbitrary and irrational. The main characteristic which unites the hallucinogens is the alteration of the perception of the user. (See V. Uelmen and G. Haddox, Drug Abuse and the Law 77-80 (1974); Note, Hallucinogens, 68 Colum. L. Rev. 521 (1968).) Although the specific effects of a substance such as psilocyn vary according to the user and according to the circumstances under which the psilocyn is taken (Panton and Fischer,

Hallucinogenic Drug-Induced Behavior Under Sensory Attenuation, 28 Archives of Gen. Psychiatry 434 (1973)), some generalizations can be made. As Dr. Siegel testified, individuals often initially feel a sense of euphoria, which gives way to a distortion of perception. Siegel stated that blurred vision occurs, accompanied by a more vivid perception of colors. Sounds may be "seen" and colors may be "heard"; this effect is known as synesthesia. While sources disagree concerning the frequency of hallucinations, in which the individual sees objects which are not there, it is apparent that they do occur. More common appear to be alterations of the individual's perception of space and time relationships. This, according to Dr. Siegel, would seriously affect a person's ability to judge distances.

As Dr. Siegel testified, there are several possible adverse psychological re-

actions to psilocyn. First, an individual may feel a sense of panic with all of the sensory changes which the substance tends to induce. Second, a temporary psychosis may be produced in someone who is not psychologically well balanced. Dr. Siegel stated that he knew of no evidence to suggest that psilocyn led to any long-term mental effects, but it should be noted that Dr. Siegel's research was performed under laboratory conditions on subjects who were selected because they were psychologically stable. Other case studies have indicated that longer lasting psychological complications can be produced. (See Hyde, Glancy, Omerod, Hall and Taylor, Abuse of Indigenous Psilocybin Mushrooms: A New Fashion and Some Psychiatric Complications, 132 Brit. J. of Psychiatry 602 (1978).) We acknowledge, however, that the research on this and other effects of psylocin is not plenti-

ful. McDonald, Mushrooms and Madness: Hallucinogenic Mushrooms and Some Psychopharmacological Implications, 25 Can. J. of Psychiatry 586 (1980).

Nonetheless, it is not the case that some facts do not exist to support the General Assembly's decision to place psilocyn along with the other major hallucinogens in Schedule I. Commentators and researchers have disagreed as to the wisdom of the approach taken in prohibiting these substances (compare Pollock, The Psilocybin Mushroom Pandemic, 7 J. Psychedelic Drugs 73 (1975), and Note, Hallucinogens, 68 Colum. L. Rev. 521, 554-60 (1968), with Young, Hutchinson, Milroy and Kesson, The Rising Price of Mushrooms, The Lancet 213 (Jan. 23, 1982)). But "[w]hether the enactment is wise or unwise; whether it is based on sound economic theory; whether it is the best means to achieve the desired results, and whether the legislative dis-

cretion within its proscribed limits should be exercised in a particular manner are matters for the judgment of the legislature, and the honest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." (Thillens, Inc. v. Morey (1957), 11 Ill. 2d 579, 593, 144 N.E.2d 735, 743, appeal dismissed (1958), 355 U.S. 606, 2 L. Ed. 2d 524, 78 S. Ct. 538.) At the time that the General Assembly adopted the Uniform Controlled Substances Act, it had before it information concerning the substances proposed to be controlled, including psilocyn (see Illinois Legislative Investigating Commission, The Drug Crisis--Report of Drug Abuse in Illinois 114-15, 185-186, 354-363 (1971)), and, based on our discussion concerning the effects produced by psilocyn, we cannot say that their decision to include that substance in Schedule I is so arbitrary as to deny

the defendants equal protection of the laws.

For these reasons, we hold that the Controlled Substances Act properly prohibits the knowing possession of mushrooms containing psilocyn as a Schedule I substance and is not unconstitutional for so doing. The trial court thus erred in dismissing the informations against the defendants, and the decision of the circuit court of Williamson County is reversed and the cause is remanded for further proceedings on those informations.

Reversed and remanded.

KARNS, P.J., and JONES, J., concur.

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff	)	
vs.	)	No. 80-CF-42
REVEL L. FREEMAN and BRIAN K. DUNLAP,	)	
Defendants	)	

ORDER DISMISSING INFORMATIONS

This cause having come on for hearing on the Motions to Dismiss and the Motions to Reconsider Preliminary Hearing of Revel L. Freeman and Brian K. Dunlap, and the People of the State of Illinois, being present by and through Robert T. Coleman, Assistant State's Attorney of Williamson County, Illinois, and Revel L. Freeman being present in person and by his Attorney, Raymond Lawler, and Brian K. Dunlap being present in person and by his attorney, Paul T. Austin, and the Court having considered all of the evidence

presented to the Court at the Preliminary Hearing and the Motion to Dismiss and having considered the Motions to Dismiss and the Motions to Reconsider the Preliminary Hearing, and the arguments and briefs of Counsel, finds that the Illinois Control [sic] Substances Act does not make it illegal to possess, plant, grow, cultivate, harvest, preserve or package for sale and distribution mushrooms containing psilocyn or psilocybin and that such an interpretation would violate the due process clause of the Fourteenth Amendment because the Illinois Control [sic] Substance [sic] Act does not give notice that such conduct is illegal.

WHEREFORE, IT IS ORDERED for the aforementioned reasons that there is no probable cause to believe that a crime has been committed and that the Informations in the above entitled cause be and are hereby dismissed.

DATED: 10-28-81

/s/ William Lewis
JUDGE

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

April 12, 1983

Mr. Paul T. Austin
Attorney at Law
709 N. Carbon St.
Marion, IL 62959

No. 57857 - People State of Illinois, respondent, vs. Brian K. Dunlap, et al., petitioners. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

No.

Appeal to the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

BRIAN K. DUNLAP and REVEL L. FREEMAN, Defendants-Appellants	On Denial of Petition for Leave to Appeal to the Illinois Supreme Court No. 57857
vs.	On Appeal from the Appellate Court of Illinois, Fifth Judicial District No. 81-378
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee.	From the Circuit Court Williamson County, Illinois No. 80-CF-42

NOTICE OF APPEAL

To: Stephen E. Norris & Director, State's Attorneys Appellate Service Commission 1907 North Broadway Mt. Vernon, IL 62864

Hon. Randy Patchett State's Attorney Williamson County Courthouse Marion, IL 62959

Counsel for Plaintiff-Appellee, The People of the State of Illinois

YOU ARE HEREBY NOTIFIED that, pursuant to 28 U.S.C. Sec. 1257(2), Defendants-Appellants BRIAN K. DUNLAP and REVEL L. FREEMAN hereby appeal to the United States Supreme Court from the denial of their petition for leave to appeal to the Illinois Supreme Court on April 12, 1983, and from the judgment of the Illinois Appellate Court entered November 22, 1982, rehearing denied on December 17, 1982, in favor of Plaintiff-Appellee and against Defendants-Appellants.

Defendants-Appellants pray that the United States Supreme Court reverse the judgment of the Illinois Appellate Court and remand the case with directions to enter judgment for Defendants-Appellants, or to itself enter such judgment for Defendants-Appellants; and to grant such other relief from said judgments and orders as the Court deem proper and just.

Dated this 10th day of June, 1983.

BRIAN K. DUNLAP and
REVEL L. FREEMAN

By: /s/ Edward J. Kionka
Edward J. Kionka
Their Attorney

LAW OFFICES
EDWARD J. KIONKA
Kionka and Kionka
1201 West Carter Street
Carbondale, IL 62901
(618) 529-5500

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document was served upon the attorneys for The People of the State of Illinois by enclosing a true copy in a sealed envelope addressed to the attorneys listed above at the addresses stated, with first class postage fully prepaid, and depositing said envelopes in the United States Mail in Carbondale, Illinois on the 10th day of June, 1983, all in accordance with Rule 28 of the Rules of the United States Supreme Court.

/s/ Edward J Kionka
Edward J. Kionka
Counsel for Defendants-Appellants

No. 83-48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BRIAN K. DUNLAP and REVEL L. FREEMAN,

Appellants,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Appellate Court Of Illinois, Fifth Judicial District

MOTION TO DISMISS OR AFFIRM

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Printed by Authority of the State of Illinois (P.O. 31960—55—9-2-83)

QUESTIONS PRESENTED

I. Whether the State of Illinois' classification of psilocyn as a Schedule I controlled substance violates appellants' right to equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution where there are rational bases for upholding the legislative classification?

II. Whether the State of Illinois' inclusion, of "any material . . . which contains any quantity of . . . psilocyn", in its enumeration of Schedule I controlled substances, sufficiently apprised appellants that possession of Psilocybe mushrooms was proscribed so as to not violate their rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution?

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In The

Supreme Court of the United States

October Term, 1983

BRIAN K. DUNLAP and REVEL L. FREEMAN,

Appellants,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Appellate Court Of Illinois, Fifth Judicial District

MOTION TO DISMISS OR AFFIRM

To The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The People of the State of Illinois respectfully move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Appellate Court of Illinois, Fifth Judicial District, on the ground that this case does not present a substantial federal question.

OPINION BELOW

The Appellate Court of Illinois, Fifth Judicial District, reversed the order of the Circuit Court of Williamson County, Illinois, which dismissed criminal Informations filed in the above-entitled cause. The opinion of the Appellate Court is reported at 110 Ill. App. 3d 738, 442 N.E. 2d 1379 (5th Dist. 1982) and is set out in full in the Appendix to the Jurisdictional Statement at 1-38. On April 12, 1983, the Supreme Court of Illinois denied appellants' Petition for Leave to Appeal. Appendix to Jurisdictional Statement at 41.

STATEMENT OF THE CASE

The People of the State of Illinois adopt the statement of facts contained in the Illinois Appellate Court opinion and incorporate it by reference herein. See Appendix to Jurisdictional Statement at 1-4.

ARGUMENT

THIS APPEAL SHOULD BE DISMISSED, OR ALTERNATIVELY, THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED, FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

A.

The State Of Illinois' Classification Of Psilocyn As A Schedule I Controlled Substance Is Rationally Based And Thus, Does Not Deprive Appellants Of Equal Protection Of The Law.

Appellants' claim that there is no rational basis for the State of Illinois' classification of psilocyn as a Schedule I controlled substance is completely without merit. Identical arguments have been made and uniformly lost with regard to the classification of marijuana and cocaine.[1] Nothing about appellants' contentions in this case distinguish their claim from the claims advanced in those classification cases. Accordingly, this appeal should be treated in a like fashion and it should either be dismissed or the judgment below should be affirmed.

In order to prove that the legislature has properly exercised its prerogative to classify psilocyn as a Schedule I controlled substance, the People need merely show that any state of facts, either made known or reasonably

[1] *See e.g., United States v. Stieren*, 608 F.2d 1135 (8th Cir. 1979); *United States v. Solow*, 574 F.2d 1318 (5th Cir. 1978); *National Organization For Reform Of Marijuana Laws v. Bell*, 488 F. Supp. 123 (D.D.C. 1980); *Illinois Normal, Inc. v. Scott*, 66 Ill. App. 3d 633, 383 N.E. 2d 1330 (1st Dist. 1978); *People v. McCarty*, 86 Ill. 2d 247, 427 N.E. 2d 147 (1981) and cases cited therein at 152. (Indeed, the expert who testified in this case, Dr. Ronald Siegal, was also one of two experts who testified in *McCarty*, 427 N.E. 2d at 149.)

assumed, supported its legislature's judgment. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 939, 949 (1979). This standard of judicial review gives legislatures wide discretion and permits them to attack problems in any rational manner. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), cited in *National Organization For Reform Of Marijuana Laws v. Bell*, 488 F. Supp. 123, 134 (D.D.C. 1980). Surely, the state has met its burden in this case, where there is ample authority and precedent for the classification.

The Illinois legislature enacted the Controlled Substances Act (Ill. Rev. Stat. 1979, ch. 56½, § 1100 *et seq.*) in order to combat the rising incidence in the abuse of drugs and other dangerous substances and its resultant damage to the peace, health and welfare of the citizens of Illinois. *Ill. Rev. Stat.* 1979, ch. 56½, §1100. This act is based on the Uniform Controlled Substances Act. 9 Uniform Laws Annot. 197 (1970). In determining that the classifications established by the Uniform Act were appropriate for state use, the legislature utilized the information it had before it concerning the substances proposed to be controlled, including psilocyn. *See* Illinois Legislative Investigation Commission, *The Drug Crisis—Report of Drug Abuse in Illinois*, at 114-15, 185-86, 354-63 (1971). The legislature classified psilocyn in its most serious category as a Schedule I controlled substance as did both the Uniform Act and the federal Drug Abuse Prevention and Control Act. 21 U.S.C. § 812. The commissioners' Note to Section 203 of the Uniform Act provides that ma-

jor hallucinogens and certain narcotic substances are included in Schedule I primarily because "both groups of drugs have no accepted use in the United States and both have a high potential for abuse." 9 Uniform Laws Annot. 197 (1970).

The issue of the validity of the state's classification of psilocyn as a Schedule I controlled substance was one of law, not of fact. Thus, the appellate court was called upon to analyze the available authorities on the subject. This the court appropriately did. Based on those authorities it held that the legislature's decision to include psilocyn in Schedule I was not so arbitrary as to deny the appellants equal protection of the law. The court recognized that commentators and researchers have disagreed on the wisdom of the approach taken in prohibiting these substances and also that "[W]hether the enactment is wise or unwise; whether it is the best means to achieve the desired results, and whether the legislative discretion within its proscribed limits should be exercised in a particular manner are matters for the judgment of the legislature, and the honest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *People v. Dunlap and Freeman*, 110 Ill. App. 3d 738, 442 N.E. 2d 1379, 1388 (5th Dist. 1983), quoting *Thillens, Inc. v. Morey*, 11 Ill. 2d 579, 144 N.E. 2d 735, 743 (1957), *appeal dismissed*, 355 U.S. 606 (1958); Appendix to Jurisdictional Statement at 36-37. This was the appropriate analysis of the issue and there is no reason whatever for this Court to disturb the appellate court's conclusion.

The fact that appellants produced an expert witness in the trial court who opined that psilocyn was not justifiably classified as a Schedule I controlled substance, while the People produced no expert witnesses, did not affect the

disposition of the matter. Resolution of the issue simply did not turn on the appellate court's counting the number of experts each side presented or the number of articles each side submitted. Resolution turned solely on whether the classification offended the Equal Protection Clause of the Fourteenth Amendment as a matter of law. The expert's opinion only lent authority to appellants' claim; it did not serve, nor could it have served, as a substitute for the court's analysis of the legal issue presented. Accordingly, appellants' argument that they should have an opportunity to contest "the correctness and authority of these articles" (Jurisdictional Statement at 18) is beside the point.

B.

The State Of Illinois' Inclusion Of "Any Material . . . Which Contains Any Quantity Of . . . Psilocyn" In Its Enumeration Of Schedule I Controlled Substances Sufficiently Apprised Appellants That Possession Of Psilocybe Mushrooms Was Proscribed, And Thus, Their Due Process Rights Were Not Violated.

Appellants' claim that their due process rights were violated because "the Controlled Substances Act did not give [them] fair notice that their conduct was proscribed and that reasonable persons would necessarily guess at its meaning and differ as to its application. . . ." (Jurisdictional Statement at 24), is also not worthy of this Court's attention. The Illinois Appellate Court properly found that the words "any material . . . which contains any quantity of . . . psilocyn" were sufficiently clear to apprise anyone of normal intelligence that possession of Psilocybe

mushrooms was proscribed.[2] There is no reason for re-examining this issue.

This Court has often spoken of the fair warning requirements embodied in the Due Process Clause and nothing about this appeal could cause this Court to depart from its long-standing view on the subject. In *Rose v. Locke*, 423 U.S. 48, 49-50 (1975), this Court stated:

> It is settled that the fair warning requirement embodied in the Due Process Clause prohibits the States from holding an individual "criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617, 98 L. Ed. 989, 74 S. Ct. 808 (1954); *see Wainwright v. Stone*, 414 U.S. 21, 22, 38 L. Ed. 2d 179, 94 S. Ct. 190 (1973). But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for "[i]n most English words and phrases there lurk uncertainties." *Robinson v. United States*, 324 U.S. 282, 286, 89 L. Ed. 944, 54 S. Ct. 666 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid. *Cf. Nash v. United States*, 229 U.S. 373, 57 L. Ed. 1232, 33 S. Ct. 780 (1913); *United States v. National Dairy Corp.*, 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963). All the Due Process Clause requires is that the law give sufficient warning that

[2] Indeed, as the Appellate Court pointed out (110 Ill. App. 3d 738, 442 N.E. 2d 1379, 1383 (5th Dist. 1983); Appendix to Jurisdictional Statement at 14-15), even appellants' own expert testified that psilocyn is predominantly taken by eating mushrooms which contain the substance and the only company in the world that manufactured psilocyn ceased production of it in 1966!

men may conduct themselves so as to avoid that which is forbidden (footnote omitted).

Viewed against this standard, appellants were adequately apprised that possession of Psilocybe mushrooms was proscribed. Acccordingly, they have raised no substantial question regarding their due process rights.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois request that this appeal be dismissed or, alternatively, the decision of the Appellate Court of Illinois, Fifth Judicial District, be affirmed for want of a substantial federal question.

Respectfully submitted,

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September 2, 1983